8319

The Sherwin-Williams Company
101 Prospect Avenue, N.W.
Cleveland, Ohio 44115-1075

April 21, 1989

VIA FAX

Michael Berman, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region V
Office of Regional Counsel
230 South Dearborn Street
Chicago, Illinois 60604

Re: Fields Brook

Dear Mike:

This letter responds to the administrative order issued by the EPA, Region V, at the Fields Brook site against Sherwin-Williams on March 22, 1989. We appreciated the opportunity to meet with you on April 11, 1989, to discuss our concerns with issuance of the administrative order on Fields Brook against Sherwin-Williams, and to discuss the basis for our support of the April 7, 1989, upper brook proposal. This letter should be included in the administrative record for issuance of the administrative order. I would first like to summarize our general concerns and then provide specific comments to the order.

1. There is no legal or technical basis for EPA to issue the administrative order against Sherwin-Williams. The administrative record does not support EPA's determination to name Sherwin-Williams in the order. Issuance of the order to Sherwin-Williams amounts to an arbitrary policy decision by EPA to have Sherwin-Williams pay for the contamination caused by other companies at the site. EPA has no basis to name the company in an Order for any part of the stream. Moreover, Sherwin-Williams' operations had nothing to do with the substantial contamination downstream from Reaches 8 and 13.

2. There is no technical basis for an Administrative Order against Sherwin-Williams which covers the Fields Brook site. The Region has not alleged that Sherwin-Williams has any responsibility for PCBs or organics, or for the enormously greater risk factors and expense associated with organics and PCBs in downstream reaches as compared to upstream reaches 8 and 13.

During our April 11, 1989, meeting with EPA, we informed you that baryte ore, the primary raw material for Sherwin-Williams' two year barium operation (1968 to 1970), does not contain arsenic. Regarding Sherwin-Williams' titanium dioxide operation which was operated from 1969-1974, there is no evidence of releases of hazardous substances from the titanium operation. Sherwin-Williams did not contribute to the hazardous substances at Fields Brook. For these reasons, we strenuously object to inclusion of Sherwin-Williams in the Section 106 Order. EPA seems to rely simply on Sherwin-Williams location in the brook area as a basis to issue the Order against the company. EPA has arbitrarily and unlawfully issued an order against Sherwin-Williams covering the entire site.

3. EPA has no authority to issue a section 106 order against Sherwin-Williams at the Fields Brook site since Sherwin-Williams operated a plant at the Fields Brook site from 1968 to 1974 under permits issued by federal or state agencies. Any discharge resulting from the Sherwin-Williams plant during this period constituted a federally permitted release under Section 107(J) of Superfund. Section 107(J) states: "Recovery by any person (including the United States or any state or Indian tribe) for response cost or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this Section."

   During its ownership of the plant, Sherwin-Williams held state or federal permits. Moreover, as confirmed by Allen Wojtas at our April 11, 1989, meeting, there is no evidence that Sherwin-Williams' operations resulted in any discharges of organics or PCBs.

4. Even if Congress had not adopted the Superfund Section 107(j) provision, the data clearly shows that Sherwin-Williams would be a de minimis PRP pursuant to Section 122(g). Sherwin-Williams clearly meets the EPA guidelines for de minimis PRPs, since EPA has ample information to determine that Sherwin-Williams' contribution by volume of hazardous substances at the site and toxicity of hazardous substances is not only minimal at the site, but nonexistent in relation to the contributors of PCBs, organics, and inorganics at the site. There are sufficient numbers of non-de minimis major contributors who are financially viable. EPA also has information about the costs of remediating site contamination. EPA policy further recognizes that it is appropriate to

minimize the transaction costs of parties with questionable or minimal connections to a Superfund site. See 52 Fed. Reg. 24335 (June 30, 1987)

While Superfund liability has been established to be joint and several, case law such as Stringfellow has established that it is clearly appropriate to apportion liability where it can be shown to be divisible. EPA has developed policies to address apportionment at Superfund sites. For example, at the Resolve Site in Region I, EPA adopted a non-binding allocation of responsibility (NBAR) which required contributors of PCBs to contribute substantially more to Superfund settlement than other PRPs who were considered de minimis based on the low toxicity of their effluent.

EPA has recognized that PCB toxicity has a causal relation to Superfund cleanup costs, 52 Fed. Reg. 19920, (May 28, 1987). Using PCBs as an example, EPA states in its NBAR guidance that "waste types and volumes that necessitate particular remedial activities will be fully attributed to the appropriate [PCB] contributors." Id. The same rationale would apply as well to major contributors of organics, since contamination from organics also necessitates substantial additional remedial costs. To this date, the Region has been unwilling to apply legal and policy mechanisms to address parties with nonexistent or minimal connections to the Fields Brook site.

5. The allocation prepared by Diamond Shamrock, RMI and Gulf & Western constitutes the major obstacle to settlement at the site. The allocation is based on the false assumption that a company located in a higher upstream area of the brook is a more significant contributor to site contamination regardless of the nature of the company's operations. The three company allocation does not make any attempt to compare individual company operations to contamination found at various parts of the site. The allocation also does not consider the industrial process, number of plants operated, years of operation and releases of hazardous substances.

   The allocation also does not allocate responsibility for the enormously greater risk factors and expense associated with downstream reaches compared to upstream reaches 8 and 13, as well as EPA's estimate that $30 million in additional costs in site cleanup is

attributable to companies which are responsible for releases of organics and PCBs.

Most disturbing about the allocation is that, regardless of the lack of evidence on inorganics, organics or PCBs against Sherwin-Williams, the allocation assesses a share to Sherwin-Williams for all reaches which are downstream from company operations. To allow such an allocation to form the basis for work at the site would constitute a serious injustice, particularly in view of the evidence available to EPA regarding major contributors of organics, inorganics and PCBs. We believe that EPA is well aware of the major contributors of hazardous substances. This allocation would allow major contributors to redistribute the cost of cleanup at Superfund sites to those who have a highly questionable involvement.

6. Section 106(a) of Superfund requires the President to make a finding that there may be a substantial endangerment to the public health welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, before issuing a Section 106 Order. As discussed above and in more detail below, there is no evidence of any actual or threatened release of a hazardous substance from Sherwin-Williams that would result in an imminent and substantial endangerment. There is no evidence to support a finding that Sherwin-Williams contributed to a situation representing an imminent and substantial endangerment. EPA has informed us that there is no evidence that Sherwin-Williams released organics or PCBs. In addition, there is no evidence that Sherwin-Williams contributed to the highly contaminated downstream reaches and associated high risk levels which form the basis for classifying Fields Brook as a Superfund site.

7. We have substantial concerns about the administrative process which led to the issuance of the Order. The three companies which prepared the allocation for the site (Diamond Shamrock, RMI and Gulf and Western) did not involve other parties in development of their allocation, and did not invite these companies to negotiations with the government to discuss cleanup plans at the site unless they agreed to the three-company allocation. Moreover, the three companies stated that participation by Sherwin-Williams and other companies in their proposal to address the administrative order was contingent on Sherwin-Williams' and other companies' agreement to the

allocation that they prepared. Under this allocation, Sherwin-Williams would pay more than significant contributors of PCBs, organics and inorganics. Such an allocation is simply unacceptable and cannot form the basis for a settlement.

8. We have conducted an extensive review of the evidence and have made a good faith attempt to work towards settlement of the site. As you know, I recommended that the site be divided into two operable units (downstream reaches and the upstream reaches) before EPA issued the administrative order as an appropriate basis to address the site. The available technical data clearly suggests a dramatic break in type and significance of contamination between this area and the downstream reaches. The Remedial Investigation Report states that chlorinated benzene, PNAs, hexachlorabutadiene and PCBs were not detected upstream of the brooks confluence with Detrex tributary. While Sherwin-Williams believes that EPA had no authority to issue the administrative order for any part of the site, we supported the proposal to EPA to participate in the sediment study and the source control for reaches 8 and 13. We feel that this proposal clearly represents a good faith response to the order.

I would now like to provide specific comments on the administrative order itself.

1. Paragraph 5 on page 7 states that "hazardous substances contributing to calculated excess lifetime risks from sediment ingestion within Fields Brook and its tributaries of as high as 10-2 include 1,1,2,2,-tetrachloroethane, tetrachloroethane, polychlorinated biphenols (PCBs), hexochlorobenzene, and hexachlorobutadiene. Estimated daily intakes for cadmium, thallium, silver and mercury were calculated." There is no evidence that Sherwin-Williams was responsible for any of these hazardous substances, and there is no evidence that its operations contributed to excess lifetime risks.

2. Paragraph 6 on pages 7-8 states that "the respondents disposed of one or more of the hazardous substances identified in tables 1 and 2 onto the site by discharging at the present time or in the past these hazardous substances, etc.." Sherwin-Williams denies that it disposed of one or more of the hazardous substances in tables 1 and 2 onto the site.

3. Paragraph 7 on page 8 states that analysis of fish tissue caught in Fields Brook indicates presence of organics and PCBs. EPA relies on the statement as a basis to support classification of Fields Brook as a Superfund site. Sherwin-Williams has not discharged any of the organics or PCBs identified in this paragraph as contributors to excess cancer risk. As discussed earlier, EPA has admitted it has no evidence linking PCBs or organics to Sherwin-Williams.

4. Paragraph 10 on page 9 states that "the primary chemicals contributing to the [excess lifetime cancer] risk are 1,1,2,2,-tetrachlorethane, tetrachlorethane, PCBs, hexachlorobenzene and hexachlorobutadiene." EPA's concern about the Fields Brook site is primarily based on the risk posed by these hazardous substances. Again, EPA has admitted that it is not alleging that Sherwin-Williams released any of these hazardous substances.

5. Paragraph 11 on page 9 states that "residents and casual visitors can also be exposed to volatile chemicals and surface water by wading in Fields Brook and its tributaries". Again, there is no connection between the excess lifetime cancer risk due to exposure to volatile chemicals and anything resulting from Sherwin-Williams' operations.

6. Regarding paragraph 2 on page 11, Sherwin-Williams denies that it is a "person" as that term is defined in Section 101(21) of CERCLA, 42 USC Section 9601(21) for purposes of denying that EPA has a basis to issue the Administrative Order against Sherwin-Williams.

7. Regarding paragraph 3 on page 11, Sherwin-Williams denies it was an owner or operator within the meaning of Section 101(20) of CERCLA for purposes of this Order for purposes of denying that EPA has a basis to issue the Administrative Order against Sherwin-Williams.

8. Regarding paragraph 4 on page 11, Sherwin-Williams denies that it is liable for all costs incurred by the government for the RD and pre-design activities of the sediment operable unit and RI/FS activities of the source control operable unit required by this Administrative Order. As discussed above, there is no basis for the government to name Sherwin-Williams in the Administrative Order. In particular, EPA has no basis to issue an Order to Sherwin-Williams which covers the heavily contaminated downstream reaches of the brook.

9. Regarding paragraph 8 on page 12, we deny that the actions required by the Order are consistent with the National Contingency Plan.

10. On pages 13 and 14 of the Administrative Order, EPA outlines the major elements of work to be performed under the Order. As discussed above, there is no legal or technical basis to subject Sherwin-Williams to these elements of work. In any event, there is clearly no evidence to show that Sherwin-Williams should be involved in the major elements of the work relating to investigation and cleanup of downstream reaches.

We believe that it was clearly improper for the Region to name Sherwin-Williams in this order. Nonetheless, Sherwin-Williams has made a good faith effort to support a proposal to EPA for addressing the remedial design and source control. As we discussed, through mechanisms such as de minimis settlements, NBARs and "carve out" settlements, EPA has the means to determine how to fairly allocate costs of cleanup at Superfund sites. To this point, the Region has rejected application of laws and policies which are designed to achieve fair settlements.

We would like to continue to work with you to work out our concerns at the site. For the reasons discussed in this letter, we also request that Region V remove Sherwin-Williams from the Administrative Order and dismiss Sherwin-Williams from consideration as a PRP at the site.

Thank you for your assistance on this matter.

Very truly yours,

Allen J. Danzig
Attorney

AJD:md

cc: Allen Wojtas
Connie Puchalski
Michael Elam
Steve Willey
Basil Constantelos

66941

HS

~~NO ANSWER~~

Mail

contains a total of 1